

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.6 Lesser-Included Offenses Under CSC Act

B. Applicable Statute and Three-Part Test

Insert the following text on page 110 before subsection (C):

In *People v Apgar*, ___ Mich App ___, ___ (2004), the Court of Appeals applied the three-part test outlined in *Cornell** and MCL 768.32 and determined that CSC III (victim between the ages of 13 and 16) is not a necessarily included lesser offense of CSC I. In *Apgar*, the defendant was charged with two counts of CSC I: one count was based on penetration by an offender who is armed with a weapon or an instrument that the victim reasonably believes is a weapon, MCL 750.520b(1)(e), and one count was based on penetration by an offender who is aided or abetted by one or more other persons, and where the offender uses force or coercion to accomplish the act of sexual penetration, MCL 750.520b(1)(d). After the jury had been selected, the prosecutor moved to amend the felony complaint to include a charge of CSC III, MCL 750.520d(1)(a) (victim between the ages of thirteen and sixteen). The trial court denied the motion. However, the trial court subsequently provided a jury instruction on CSC III, and the jury found the defendant guilty of CSC III.

On appeal, the defendant argued that the trial court erred by instructing the jury on CSC III because it is not a necessarily included lesser offense of CSC I, as charged in this case. The Court of Appeals stated:

“The jury convicted defendant of CSC III, sexual penetration of another person at least thirteen years of age and under the age of sixteen, MCL 750.520d(1)(a). Neither of the charged counts of CSC I includes the element of the victim’s age. Thus, it is possible to commit CSC I under MCL 750.520b(1)(d) or (1)(e) without committing the uncharged offense of CSC III, MCL 750.520d(1)(a). Accordingly, under *Cornell* CSC III, MCL

**People v Cornell*, 466 Mich 335 (2002).

750.520d(1)(a), is not a necessarily included lesser offense of CSC I, MCL 750.520b(1)(d) or (1)(e). Because both offenses require the act of sexual penetration and are of the same category of crimes, CSC III is a cognate lesser offense of CSC I as applied to this case.” *Apgar, supra* at ____.

Although the Court found CSC III is not a necessarily included lesser offense of CSC I, the Court affirmed the defendant’s conviction. The Court concluded that the defendant was not deprived of due process when the trial court instructed the jury on CSC III over defense counsel’s objection. According to the Court, “defendant was not deprived of due process because all of the elements of the uncharged crime [CSC III] were proved at the preliminary examination and trial without objection, providing defendant adequate notice.” *Apgar, supra* at ____.

Judge Murphy concurred in the majority’s conclusion that, as charged in this case, CSC III is a cognate lesser offense of CSC I but dissented from the majority’s affirmance of defendant’s conviction. Judge Murphy found no support in case law for “the position that a cognate lesser offense instruction may still be permissible or allowed to stand if due process rights are not offended and there exists evidence to support a finding of guilt for the cognate lesser offense.” *Apgar, supra* at ____ (Murphy, J, concurring in part and dissenting in part).

November 2004

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CHAPTER 3

Other Related Offenses

3.11 Dissemination of Sexually Explicit Matter to Minors

Insert the following note on page 144 after the January 2004 update:

Note: In *Athenaco, Ltd v Cox*, ___ F Supp 2d ___, ___ (ED Mich, 2004), the Court upheld the January 1, 2004 amendments to MCL 722.671 et seq. The plaintiffs in that case challenged the constitutionality of the amendments. The Court held that the “Act, 2003 Mich. Public Act 192, M.C.L. §§ 722.671 (a), (b) and (e), 722.675 and 722.677 . . . is neither vague nor overbroad. As such, Defendants are entitled to summary judgment on the Act’s constitutional validity.”

CHAPTER 7

General Evidence

7.3 Evidence of Other Crimes, Wrongs, or Acts

C. Admissibility of “Other-Acts” Evidence in Cases Involving Sexual Assault

Insert the following case summary on page 338 before the summary of *People v Ortiz*:

♦ *People v Drohan*, ___ Mich App ___ (2004):

The defendant was convicted of CSC III and CSC IV against a former coworker. At trial, the victim testified that the defendant rubbed the victim’s breast and grabbed her wrist and made her touch his crotch on several occasions. She also testified that he forced her into the passenger seat of a car and forced her to perform oral sex on him. The defendant argued that it was consensual sexual contact. At trial, another witness testified that on a previous occasion the defendant had grabbed her breast and grabbed her arm and tried to get her to touch his exposed penis. A third witness testified that she went to a party at the defendant’s house. She indicated that she was sleeping in the children’s room and when she woke up the defendant’s “hands were on [her] buttocks and he was playing with himself.” The trial court admitted the testimony regarding the defendant’s former acts because it was “relevant to show the existence of a scheme, plan, or method by which the defendant accomplished the sexual assault in that consent is an issue, therefore, showing a scheme, plan, or method by which he non-consentually [sic] engages in sexual assault with women is relevant to this trial.” On appeal, the defendant argued that the trial court erred in admitting this testimony. The Court of Appeals held that the evidence was introduced for a proper purpose because each of the incidents had “common features” that allowed the inference “that defendant had a common scheme of suddenly grabbing unwilling women and seeking immediate sexual gratification from them.” The Court also found that the evidence was relevant, and the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

On page 364, after the April 2004 update, insert the following text:

Crawford v Washington, 541 US ____ (2004), applies retrospectively to cases pending on appeal when *Crawford* was decided. *People v Bell*, ____ Mich App ____, ____ (2004).

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CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text on page 364 after the August 2004 update:

In *People v Shepherd*, ___ Mich App ___, ___ (2004), the Court of Appeals held that the transcript of a guilty plea of an unavailable witness is a “testimonial statement” and is therefore not admissible unless the defendant had a prior opportunity for cross-examination. In *Shepherd*, the defendant was convicted of perjury. The defendant was charged based upon her testimony at Mr. Butters’ trial for fleeing and eluding. After Butters’ trial, he was charged with and pleaded guilty to subornation of perjury for his part in soliciting the defendant to commit perjury. At the defendant’s trial, Butters was unavailable but the transcript of Butters’ guilty plea was admitted as evidence of defendant’s perjury. The defendant appealed, arguing that the plea constituted “testimonial evidence” and was therefore inadmissible under *Crawford v Washington*, 541 US ___ (2004), which held that the admission of an unavailable witness’ testimonial evidence violates the Confrontation Clause unless the defendant had a prior opportunity for cross-examination. In reversing the conviction, the Court stated:

“The trial court’s admission of the transcript of Mr. Butters’ guilty plea was clearly improper. Mr. Butters’ testimony made under oath in court is an obvious example of testimonial evidence—Mr. Butters bore testimony against himself implicating defendant in his crime of subornation of perjury. Defendant was absent from that proceeding and was given no opportunity for cross-examination. Furthermore, the transcript was presented to prove the truth of the matter asserted—that defendant gave false testimony pursuant to Mr. Butters’ solicitation of these particular statements. As such, its admission violated defendant’s Sixth Amendment right to confront the witnesses against her.”

During the defendant's perjury trial, a letter written by Mr. Butters to the defendant was also admitted into evidence. The letter, referred to as the "script," contained 21 questions and answers involving the original charge that Mr. Butters faced. The defendant argued that the admission violated her right to confront the defendant. The Court of Appeals concluded that the letter was not "testimonial evidence." Further, the Court held that because the letter bore sufficient indicia of reliability, it was admissible.

CHAPTER 11

Sex Offender Identification and Profiling Systems

11.2 Sex Offenders Registration Act

A. Who Must Register?

1. “Convicted”

On page 514, replace the second bullet with the following text:

- ♦ Being assigned to youthful trainee status pursuant to MCL 762.11-762.15 before October 1, 2004. MCL 28.722(a)(ii)(A).*
- ♦ Being assigned to youthful trainee status pursuant to MCL 762.11-762.15 on or after October 1, 2004, if the individual’s status of youthful trainee is revoked and an adjudication of guilt is entered. MCL 28.722(a)(ii)(B).

Note: Effective October 1, 2004, 2004 PA 239 amended the Holmes Youthful Trainee Act to prevent individuals charged with certain sex offenses from being assigned to youthful trainee status.

Youthful trainee status is not available for an individual who pleads guilty to a violation, an attempted violation, or conspiracy to violate any of the following statutes:*

- MCL 750.520b, first-degree criminal sexual conduct;
- MCL 750.520c, second-degree criminal sexual conduct;
- MCL 750.520d, third-degree criminal sexual conduct (except under MCL 750.520d(1)(a), which requires that the victim be at least 13 years of age but under 16 years of age);
- MCL 750.520e, fourth-degree criminal sexual conduct (except under MCL 750.520e(1)(a), which requires that the victim be at least 13 years of age but under 16 years of age, and that the actor be five or more years older than the victim);
- MCL 750.520g, assault with the intent to commit a violation of one of the above enumerated offenses. MCL 762.11(2)(d)–(e).

MCL 762.11(3) also prohibits a court from assigning an individual to youthful trainee status if any of the following apply:

*See 2004 PA 240, effective October 1, 2004.

*This listing only contains sexual conduct crimes; it is not the complete list of crimes contained in MCL 762.11. For a complete listing, see 2004 PA 239.

*“Listed offense” is defined in MCL 28.722. MCL 762.11(4)(a). See Section 11.2(A)(2), below, for more information.

“(a) The individual was previously convicted of or adjudicated for a listed offense* for which registration is required under the sex offenders registration act, 1994 PA 295, MCL 28.721 to 28.732.

“(b) If the individual is charged with a listed offense for which registration is required under the sex offenders registration act, 1994 PA 295, MCL 28.721 to 28.732, the individual fails to carry the burden of proving by clear and convincing evidence that he or she is not likely to engage in further listed offenses.

“(c) The court determines that the offense involved any of the following:

*See Section 2.2(A)(1) for a listing of the factors.

(i) A factor set forth in section 520b(1)(a) to (h) of the Michigan penal code, 1931 PA 328, MCL 750.520b.*

*See Section 2.3(A)(1) for a listing of the factors.

(ii) A factor set forth in section 520c(1)(a) to (l) of the Michigan penal code, 1931 PA 328, MCL 750.520c.*

*See Section 2.2(B)(1) for a listing of the factors.

(iii) A factor set forth in section 520d(1)(b) to (e) of the Michigan penal code, 1931 PA 328, MCL 750.520d.*

*See Section 2.3(B)(1) for a listing of the factors.

(iv) A factor set forth in section 520e(1)(b) to (f) of the Michigan penal code, 1931 PA 328, MCL 750.520e.”*

2004 PA 240 allows certain individuals assigned to youthful trainee status before October 1, 2004, to petition the court for a reduction in the period of time during which they must comply with SORA. See new subsection (I), below, for more information.

11.2 Sex Offenders Registration Act

B. Initial Registration and Duties

1. Individuals Convicted in Michigan

On page 518, in the first full paragraph after the “**Note**,” replace the first sentence with the following text:

The probation officer or the court must provide the registration form, explain the duty to register and to pay a registration fee,* to verify his or her address, and to provide notice of address changes, and accept the completed registration for processing under MCL 28.726. MCL 28.724(5), as amended by 2004 PA 240 and 2004 PA 237.

*See sub-
subsection 11.2
(D)(4), below,
for information
on the
registration fee.

11.2 Sex Offenders Registration Act

D. The “Registration”

On page 521, immediately after sub-subsection (3), insert the following new sub-subsection:

4. Registration Fee

In addition to remitting the verification form, the individual is responsible for submitting a \$35.00 original registration fee to the State Police unless excused from the fee under MCL 28.725b. MCL 28.727(1). MCL 28.725b(3) provides that the registration fee may be temporarily waived if the individual is indigent.

MCL 28.729(4) states:

“An individual who willfully refuses or fails to pay the registration fee prescribed in [MCL 28.725a*] or [MCL 28.727(1)] within 90 days of the date the individual reports under [MCL 28.724a] or [MCL 28.725a] is guilty of a misdemeanor punishable by imprisonment for not more than 90 days.”

*As amended
by 2004 PA 237
and 2004 PA
240.

E. Length of Registration Period

1. Lifetime Registration

After the last bullet on page 521, insert the following text:

Certain individuals may be excused from lifetime registration if they file a petition pursuant to MCL 28.728c and the petition is granted. For more information on filing a petition pursuant to MCL 28.728c, see subsection (I), below.

11.2 Sex Offenders Registration Act

E. Length of Registration Period

2. 25-Year Registration or 10-Years After Release From Prison

Near the top of page 522, at the end of this sub-subsection, insert the following text:

Certain individuals may be excused from the 25-year or 10-year registration requirements if they file a petition pursuant to MCL 28.728c and the petition is granted. For more information on filing a petition pursuant to MCL 28.728c, see subsection (I), below.

F. Yearly or Quarterly Verification of Domicile or Residence

On page 522, after the bulleted list, insert the following text:

The continued reporting requirements do not apply to “an individual convicted as a juvenile of committing an offense described in [MCL 28.728c(15)(a) or (b)] committed by the individual when he or she was less than 17 years of age, except that the individual shall report a change in his or her residence within this state or to another state as provided in this section within 10 days after the change of residence is made. If the individual fails to file a petition under [MCL 28.728c] before he or she becomes 18 years of age, or if his or her petition is denied by the court, the individual shall report as otherwise required under this section.” MCL 28.725a(5), as amended by 2004 PA 240.* See subsection (I), below, for a list of the offenses described in MCL 28.728c(15)(a) and (b) and for more information on petitions filed pursuant to MCL 28.728c.

Near the middle of page 522, insert the following text at the end of the first full paragraph after the bulleted list:

An individual who reports pursuant to MCL 28.725a(3) or (4) and who has not already paid the sex offender registration fee must pay a \$35.00 sex offender registration fee. The individual must only be required to pay the fee once. MCL 28.725a(7), as amended by 2004 PA 237.

*Effective
October 1,
2004.

*Effective
October 16,
2004.

11.2 Sex Offenders Registration Act

G. Public Notification and the Computerized Databases

Near the bottom of page 524, add the following text to the bulleted list:

- ♦ Beginning May 1, 2005, a photograph of each individual. Photographs will be obtained from the Secretary of State. MCL 28.728(4)(c), as amended by 2004 PA 240.*

*Effective
October 1,
2004.

11.2 Sex Offenders Registration Act

H. Juvenile Offenders Exempt From Public Notification Requirements

On age 525, replace the text of subsection (H) with the following text:

Although juvenile offenders not tried as adults are subject to the same registration requirements as adult offenders,* they are generally exempted from the SORA's public notification requirements and from having their registrations placed in the State Police's public database. See MCL 28.728(2) and *In re Ayres*, 239 Mich App 8, 12 (1999). However, except as set forth in subsection (I), below, this exemption does not apply to juvenile dispositions for either first-degree criminal sexual conduct, MCL 750.520b, or second-degree criminal sexual conduct, MCL 750.520c, after the juvenile offender becomes 18 years of age. Nor does this exemption apply to juvenile offenders convicted under "automatic" or "traditional" waivers, or by "case designation" methods. MCL 28.728(3) provides in pertinent part:

"(3) The database described in subsection (2) shall not include the following individuals:

"(a) An individual registered solely because he or she had 1 or more dispositions for a listed offense entered under section 18 of chapter XIA of the probate code of 1939, 1939 PA 288, MCL 712A.18, in a case that was not designated as a case in which the individual was to be tried in the same manner as an adult under section 2d of chapter XIA of the probate code of 1939, 1939 PA 288, MCL 712A.2d. Except as provided in subdivision (b), the exclusion for juvenile dispositions does not apply to a disposition for a violation of section 520b or 520c of the Michigan penal code, 1931 PA 328, MCL 750.520b and 750.520c, after the individual becomes 18 years of age.

"(b) An individual who is exempt under section 8d from that database."

I. Petition for Exemption From Registration or Alternate Registration Period

On page 526, insert the following new subsection (I) and redesignate existing subsections (I)-(L) accordingly:

Juveniles convicted of criminal sexual conduct offenses listed below may petition the court for exemption from the registration requirements of SORA. In addition, individuals who successfully complete youthful trainee status may petition the court to reduce the period of time during which they are subject to the registration and reporting requirements of SORA.*

*See Section 11.2(D) for registration requirements.

*2004 PA 240, effective October 1, 2004.

1. Who May Petition the Court

Convictions before October 1, 2004. MCL 28.728c(1) provides that the following individuals, if convicted before October 1, 2004, may petition the court to seek registration under MCL 28.728d(1):

- ♦ An individual convicted as a juvenile of committing, attempting to commit, or conspiring to commit a violation of MCL 750.520b(1)(a), MCL 750.520c(1)(a), or MCL 750.520d(1)(a), if either of the following applies:
 - The individual was under 13 years of age when he or she committed the offense and is not more than five years older than the victim; or
 - The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than three years older than the victim. MCL 28.728c(15)(a)(i)-(ii).
- ♦ An individual who is charged with committing, attempting to commit, or conspiring to commit a violation of MCL 750.520b(1)(a), MCL 750.520c(1)(a), or MCL 750.520d(1)(a), and is convicted as a juvenile of violating, attempting to violate, or conspiring to violate MCL 750.520e or MCL 750.520g, if either of the following applies:
 - The individual was under 13 years of age when he or she committed the offense and is not more than five years older than the victim.
 - The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than three years older than the victim. MCL 28.728c(15)(b)(i)-(ii).
- ♦ An individual who has successfully completed his or her probationary period under the Holmes Youthful Trainee Act, MCL 762.11-762.15, for committing a listed offense and has been discharged from youthful trainee status.* MCL 28.728c(15)(c).

*For more information on youthful trainee status, see subsection 11.2 (A)(1), above.

*A court may hold a petition in abeyance if the petitioner has a pending felony charge. See subsection 11.2 (I)(4), below.

MCL 28.728c(4) provides that a petition under MCL 28.728c(1) must be “filed before October 1, 2007 or within 3 years after the individual is discharged from the jurisdiction of the juvenile court or, if the individual was assigned to youthful trainee status, within 3 years after he or she has successfully completed youthful trainee status, whichever is later, and, except as otherwise provided in this subsection,* the court shall not consider a petition filed by the individual after that date.”

Convictions on or after October 1, 2004. MCL 28.728c(2) provides that the following individuals, if convicted on or after October 1, 2004, may petition the court to seek registration under MCL 28.728d(1):

- ♦ An individual convicted as a juvenile of committing, attempting to commit, or conspiring to commit a violation of MCL 750.520b(1)(a), MCL 750.520c(1)(a), or MCL 750.520d(1)(a), if either of the following applies:
 - The individual was under 13 years of age when he or she committed the offense and is not more than five years older than the victim; or
 - The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than three years older than the victim. MCL 28.728c(15)(a)(i)-(ii).
- ♦ An individual who is charged with committing, attempting to commit, or conspiring to commit a violation of MCL 750.520b(1)(a), MCL 750.520c(1)(a), or MCL 750.520d(1)(a), and is convicted as a juvenile of violating, attempting to violate, or conspiring to violate MCL 750.520e or MCL 750.520g, if either of the following applies:
 - The individual was under 13 years of age when he or she committed the offense and is not more than five years older than the victim.
 - The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than three years older than the victim. MCL 28.728c(15)(b)(i)-(ii).

MCL 28.728c(4) provides that a petition under MCL 28.728c(2) “shall not be filed before the individual’s seventeenth birthday or after the individual’s twentieth birthday.”

2. Filing the Petition

A petition filed under MCL 28.728c must be filed in the court where the juvenile was convicted of the listed offense. MCL 28.728c(4). A petition shall not be filed under MCL 28.728c if a petition was previously filed and was denied by the court after a hearing. MCL 28.728c(4). At least 30 days prior to holding a hearing on the petition, a copy of the petition must also be filed with the prosecuting attorney’s office that prosecuted the case against the individual. MCL 28.728c(7).

3. Contents of the Petition

MCL 28.728c(5) requires that the petition be made under oath and contain all of the following:

- ♦ The name and address of the petitioner.
- ♦ A statement identifying the offense for which registration pursuant to MCL 28.728d is being requested.

*See sub-
subsection 11.2
(I)(5), below,
for more
information on
disqualification
under MCL
28.728c(14).

- ♦ A statement of whether the individual was previously convicted of a listed offense for which registration is required under SORA.
- ♦ A statement specifically stating that the individual is not disqualified under MCL 28.728c(14) from filing a petition.* MCL 28.728c(5)(a)-(d).

MCL 28.728c(6) states:

“An individual who knowingly makes a false statement in a petition filed under this section is guilty of perjury as proscribed under . . . MCL 750.423.”

4. Hearing on the Petition

If an individual properly files a petition, the court must conduct a hearing on the petition. MCL 28.728c(10).

*See sub-
subsection 11.2
(I)(1), above,
for more
information on
MCL
28.728c(4).

If the individual is charged in Michigan or another state with committing, attempting to commit, or conspiring to commit a felony other than the one described in the petition or an offense that if committed by an adult would be a felony, the court may hold a petition in abeyance until final disposition of the charges. MCL 28.728c(4). If the court holds the petition in abeyance, the three-year limitation period for filing a petition prescribed in MCL 28.728c(4)* begins to run when the abeyance has ended. MCL 28.728c(4).

The prosecuting attorney may appear and participate in all proceedings regarding the petition and may seek appellate review of any decision on the petition. MCL 28.728c(7). If the prosecuting attorney knows the name of the victim, he or she must provide the victim with written notice that a petition has been filed and provide the victim with a copy of the petition. The notice must be sent by first-class mail to the victim’s last known address and include a statement of the victim’s rights under MCL 28.728c(11). MCL 28.728c(8).

The victim has the right to attend all proceedings under MCL 28.728c and to make a written or oral statement to the court before any decision regarding the petition is made. MCL 28.728c(11). However, a victim must not be *required* to appear at any proceeding against his or her will. *Id.*

MCL 28.728c(12) requires the court to consider all of the following in determining whether to grant the petition:

“(a) The individual’s age and level of maturity at the time of the offense.

“(b) The victim’s age and level of maturity at the time of the offense.

“(c) The nature of the offense.

“(d) The severity of the offense.

“(e) The individual’s prior juvenile or criminal history.

“(f) The individual’s likelihood to commit further listed offenses.

“(g) Any impact statement submitted by the victim under the crime victim’s rights act, 1985 PA 87, MCL 780.751 to 780.834, or under this section.

“(h) Any other information considered relevant by the court.”

5. Denying or Granting the Petition

Pursuant to MCL 28.728c(14), the court is prohibited from granting a petition if any of the following apply:

- ◆ The petitioner was previously convicted of a listed offense for which registration is required under SORA. MCL 28.728c(14)(a).
- ◆ The petitioner fails to prove by clear and convincing evidence that he or she is not likely to commit further listed offenses. MCL 28.728c(14)(b).
- ◆ The court determines that the offense involved any of the following:
 - One of the factors set forth in MCL 750.520b(1)(b) to (h) (see Section 2.2(A)(1) for a listing of the factors);
 - One of the factors set forth in MCL 750.520c(1)(b) to (l) (see Section 2.3(A)(1) for a listing of the factors);
 - One of the factors set forth in MCL 750.520d(1)(b) to (e) (see Section 2.2(B)(1) for a listing of the factors); or
 - One of the factors set forth in MCL 750.520e(1)(b) to (f) (see Section 2.3(B)(1) for a listing of the factors). MCL 28.728c(14)(c)(i)-(iv).
- ◆ The petitioner is charged in Michigan or elsewhere with committing, attempting to commit, or conspiring to commit a felony, other than the one described in the petition, or an offense that if committed by an adult would be a felony. MCL 28.728c(14)(d).
- ◆ The petitioner was sentenced for the offense as an adult. However, this does not apply to an individual who has completed probation and was discharged under the Holmes Youthful Trainee Act. MCL 28.728c(14)(e).

“If the court determines that the individual meets the criteria for registration under [MCL 28.728d], the court may order the individual to register under this act as provided in that section.” MCL 28.728c(13).*

*See sub-
subsection
11.2(I)(7),
below.

*See sub-
subsection 11.2
(I)(1), above,
for information
concerning the
petitioners.

If the court grants the petition, the court must promptly provide a copy of the order to the State Police and to the petitioner. MCL 28.728d(3).

If the State Police are provided with an order granting the petition for a petitioner described in MCL 28.728c(15)(a) or (b),* the State Police shall not enter the individual's registration on the public registry or, if the person is already registered, the State Police must promptly remove an individual's registration from the public registry. MCL 28.728d(3). The State Police must promptly remove an individual's registration from the nonpublic registry upon expiration of the applicable registration period described in MCL 28.728d(1) or (2). MCL 28.728d(3).

6. Registration While the Petition Is Pending

MCL 28.728c(9) states:

“(9) If an individual petitions the court under subsection (1) or (2) for an offense described in subsection (15)(a) or (b) and the individual is not on the [public] database maintained under [MCL 28.728(2)] at the time the petition is filed, the court may order the department not to place the individual on that database during the period in which the court is considering whether to grant the petition as follows:

“(a) Except as provided in subdivision (b), for a period of 30 days after the date the order is issued or as provided by the court, whichever occurs first.

“(b) If jurisdiction is continued by the court past the individual's seventeenth birthday, during the period in which jurisdiction is continued. The court shall notify the department of the order as required under [MCL 28.728d].”

If the court orders the petitioner to register under MCL 28.728d pending the court's determination on the petition, the court must promptly provide a copy of that order to the State Police and to the petitioner. MCL 28.728d(2).

*See sub-
subsection 11.2
(I)(1), above,
for a
description of
these
petitioners.

If the State Police are provided with such an order for a petitioner described in MCL 28.728c(15)(a) or (b),* then the State Police must not enter the petitioner's registration into the public registry until ordered by the court to do so, or until the expiration of the order, whichever occurs first. MCL 28.728d(2).

7. Registration Pursuant to MCL 28.728d

Pursuant to MCL 28.728d(1), if the court grants a petition filed pursuant to MCL 28.728c, the petitioner must register as a sex offender as follows:

- ♦ A juvenile shall register until the petition is granted but is not subject to the requirements of the public registry. MCL 28.728d(1)(a).
- ♦ A youthful trainee who successfully completes his or her probationary period shall register for a period of ten years after the date that he or she initially registered, or if the petitioner was in a state correctional facility, for ten years after he or she is released from that facility, whichever is greater. The petitioner is subject to the requirements of the public registry during that registration period. MCL 28.728d(1)(b).

11.2 Sex Offenders Registration Act

L. Registration Violation Enforcement; Venue and Penalties

2. Penalties

Near the top of page 528, replace the text of the first bullet with the following text:

An individual who fails to comply with MCL 28.725a (yearly and quarterly verification), other than the payment of the registration fee, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a maximum fine of \$1,000.00, or both. MCL 28.729(2).*

On page 528, after the second bullet, insert the following new bullet:

♦ Failure to Pay the Registration Fee

An individual who willfully refuses or fails to pay the registration fee prescribed in MCL 28.725a* or MCL 28.727(1) within 90 days of reporting is guilty of a misdemeanor punishable by imprisonment for not more than 90 days. MCL 28.729(4), as amended by 2004 PA 237.

*2004 PA 237, effective October 16, 2004.

*2004 PA 237 and 2004 PA 240.

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.4 “Assault” Offenses

A. Assault With Intent to Commit Criminal Sexual Conduct Involving Penetration

2. Elements of Offense

On page 44, insert the following text before the “Note” near the middle of the page:

In *People v Nickens*, ___ Mich ___, ___ (2004), the Michigan Supreme Court affirmed that the elements of assault with intent to commit criminal sexual conduct involving penetration are as follows:

- ♦ The defendant committed an assault; and,
- ♦ The defendant had the intent to commit criminal sexual conduct involving penetration.

CHAPTER 2

The Criminal Sexual Conduct Act

2.6 Lesser-Included Offenses Under CSC Act

B. Applicable Statute and Three-Part Test

Insert the following case summary on page 110 immediately before the beginning of subsection C:

**People v
Cornell*, 466
Mich 335
(2002).

In *People v Nickens*, ___ Mich ___ (2004), the Supreme Court applied the three-part test outlined in *Cornell** and MCL 768.32. In *Nickens*, the defendant was charged with first-degree criminal sexual conduct involving personal injury and the use of force or coercion to accomplish sexual penetration, MCL 750.520b(1)(f). At trial, the court instructed the jury on this charge and on the charge of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). The defendant objected to the latter instruction. The defendant was found guilty of violating MCL 750.520g(1). *Nickens, supra* at ___.

The Supreme Court found that the elements of assault with intent to commit criminal sexual conduct involving penetration are (1) an assault and (2) an intent to commit criminal sexual conduct involving sexual penetration. Nonconsensual sexual penetration with another is an “attempted-battery” assault and a battery; therefore, the first element above is always satisfied when the actor violates MCL 750.520b(1)(f). In addition, the intent to commit criminal sexual conduct involving sexual penetration is always present when the defendant commits first-degree criminal sexual conduct under MCL 750.520b(1)(f). Because the elements of assault with intent to commit criminal sexual conduct involving penetration under MCL 750.520g(1) are included in first-degree criminal sexual conduct under MCL 750.520b(1)(f), assault with intent to commit criminal sexual conduct involving penetration is a necessarily lesser-included offense of first-degree criminal sexual conduct. *Nickens, supra* at ___. The Court found that a rational view of the evidence in this case supported the instruction of assault with intent to commit a criminal sexual conduct involving penetration. *Nickens, supra* at ___.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text on page 364 after the April 2004 update:

The admission of an unavailable witness' former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, ___ Mich App ___ (2004). In *McPherson*, the defendant was convicted of murder. A co-defendant made a statement to police that identified the defendant as the shooter. Prior to trial, the co-defendant died but his statement was admitted at trial. In applying the U.S. Supreme Court's holding in *Crawford v Washington*, ___ U.S. ___ (2004),* the Court of Appeals found the co-defendant's statement to police was "testimonial." However, the Court indicated that *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. In *McPherson*, the statement of the co-defendant was admitted not for its substance, but to impeach the defendant. The Court concluded that admission of the statement for impeachment purposes did not violate either *Crawford v Washington, supra* or the Confrontation Clause.

*See the April 2004 Update for a discussion of *Crawford v Washington*.

CHAPTER 8

Scientific Evidence

8.2 Expert Testimony in Sexual Assault Cases

A. General Requirements for Admissibility of Expert Testimony

Insert the following text immediately after the January 2004 update to pages 402 and 403:

The Michigan Supreme Court in *Gilbert v DaimlerChrysler Corp*, ___ Mich ___, ___ (2004), reiterated the trial court’s gatekeeper responsibility in the admission of expert testimony under amended MRE 702. The Court stated:

**Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993).

“MRE 702 has [] been amended explicitly to incorporate *Daubert’s** standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court’s fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on ‘novel’⁵² science—is reliable.

⁵² See, e.g., *People v Young*, 418 Mich 1, 24; 340 NW2d 805 (1983). Because the court’s gatekeeper role is mandated by MRE 702, rather than *Davis-Frye*, the question whether *Davis-Frye* is applicable to evidence that is not ‘novel’ has no bearing on whether the court’s gatekeeper responsibilities extend to such evidence. These responsibilities are mandated by MRE 702 irrespective of whether proffered evidence is ‘novel.’ . . .”

Gilbert, supra at ____.

The Court also indicated that the trial court must focus its MRE 702 inquiry on the data underlying the expert opinion and must evaluate the extent to which the expert extrapolates from that data in a manner consistent with *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). *Gilbert, supra*, at ____.

Update: Sexual Assault Benchbook

CHAPTER 5

Bond and Discovery

5.4 Procedures for Issuing Conditional Release Orders

C. Required Findings by Judge or District Court Magistrate

Effective June 24, 2004, MCL 765.6 was amended by 2004 PA 167. Replace the quote of MCL 765.6(1) in the middle of page 253 with the following:

“(1) Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:

“(a) The seriousness of the offense charged.

“(b) The protection of the public.

“(c) The previous criminal record and the dangerousness of the person accused.

“(d) The probability or improbability of the person accused appearing at the trial of the cause.

“(2) If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under subsection (1) and executed by a surety approved by the court.”

Update: Sexual Assault Benchbook

CHAPTER 6

Specialized Procedures Governing Preliminary Examinations and Trials

6.13 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

Effective May 13, 2004, 2004 PA 98 amended MCL 333.5129 governing testing for venereal disease, hepatitis, and HIV.

A. Defendants Arrested and Charged

1. Discretionary Examination and Testing

Replace the last paragraph on page 311 (preceding the bulleted list) with the following text:

Under MCL 333.5129(1), a defendant who is arrested and charged with a violation of any of the following prostitution offenses may, upon order of the court, be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS:*

*SCAO Form
MC 234.

Replace the first full paragraph on page 312 with the following text:

If the examination or test results indicate the presence of venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS, the examination or test results must be reported to the defendant, the department of community health, and the appropriate local health department for partner notification, as required under MCL 333.5114 and MCL 333.5114a. MCL 333.5129(1).

2. Mandatory Distribution of Venereal Disease and HIV Information and Recommendation of Counseling

Near the top of page 313, replace the cross-reference to the sixth bullet with the following text:

*A person charged with or convicted of this crime, or a corresponding local ordinance, is subject to the testing, counseling, and information distribution requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not venereal disease. MCL 333.5129(9).

On the middle of page 313, replace the first sentence of last paragraph before subsection (B) with the following text:

Additionally, the judge or magistrate must *recommend* that the defendant obtain additional information and counseling at a local health department testing and counseling center regarding venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, and AIDS. MCL 333.5129(2).

B. Defendants Bound Over to Circuit Court

1. Mandatory Examination and Testing

Near the bottom of page 313, replace the first paragraph in this subsection with the following text:

Under MCL 333.5129(3), a defendant who is bound over to circuit court for a violation of any of the following offenses must be ordered by the district court to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV, and HIV antibodies, provided there is reason to believe the alleged violation involved sexual penetration or exposure to a body fluid of the defendant:*

*SCAO Form
234.

6.13 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

E. Positive Test Results Require Referral for Appropriate Medical Care

On page 316, replace the first sentence of the first paragraph in this subsection with the following text:

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a venereal disease, hepatitis B, hepatitis C, or HIV, must be referred by the agency providing the counseling or testing for appropriate medical care. MCL 333.5129(8).

F. Ordering Payment of the Costs of Examination and Testing

On page 316 after subsection (E) insert the following new subsection:

Upon conviction or juvenile adjudication the court may order an individual who is examined or tested under MCL 333.5129 to “pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test.” MCL 333.5129(10). MCL 333.5129(11) states:

“An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] shall be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments shall be allocated as provided under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32, the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69, and the crime victim’s rights act, 1985 PA 87, MCL 780.751 to 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$100.00, or both.”

CHAPTER 7

General Evidence

7.4 Selected Hearsay Rules (and Exceptions)

D. Statements of Existing Mental, Emotional, or Physical Condition—MRE 803(3)

Near the top of page 346 before the first full paragraph, insert the following text:

A declarant's out-of-court statements of memory or belief when the statements are offered to prove the fact remembered or believed are specifically excluded from the hearsay exception described in MRE 803(3). *People v Moorer*, ___ Mich App ___, ___ (2004). In *Moorer*, the defendant argued against the admission of testimony from witnesses who claimed that the victim told them that he "had a confrontation with defendant; that defendant wanted to kill [the victim]; that defendant had threatened to kill [the victim]; that defendant said he had a bullet for [the victim]; and that defendant was looking for [the victim] with a gun." *Moorer, supra* at ___.

The Court of Appeals determined that the trial court had improperly admitted several witnesses' testimony about the victim's out-of-court statements because the statements went beyond MRE 803(3)'s exception for statements concerning a declarant's "then existing mental, emotional, or physical condition." *Moorer, supra* at ___. The Court concluded that the challenged testimony was inadmissible hearsay because it involved the *defendant's* past or presumed future actions rather than describing the *declarant-victim's* intentions or plans. *Moorer, supra* at ___.

CHAPTER 7

General Evidence

7.4 Selected Hearsay Rules (and Exceptions)

H. “Catch-All” Hearsay Exceptions—MRE 803(24) and MRE 804(b)(7)

On page 358, before the summary of *People v Lee*, insert the following case summary:

♦ *People v Geno*, ___ Mich App ___, ___ - ___ (2004):

Defendant was convicted of first-degree criminal sexual conduct for sexually penetrating the defendant’s girlfriend’s two-year-old daughter. During an assessment and interview at a children’s assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child’s pull-up. The interviewer asked the child if she “had an owie,” and the child answered, “yes, Dale [defendant] hurts me here” and pointed to her vaginal area. The defendant argued that the child’s statement was improperly admitted under MRE 803(24). The Court of Appeals held that it was not error to admit the child’s statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the four requirements outlined in *People v Katt*, 468 Mich 272 (2003).

The defendant also argued that pursuant to *Crawford v Washington*, 541 US ___ (2004), the defendant’s right to confrontation was violated by the admission of the victim’s statements. The Court of Appeals stated:

“We recognize that with respect to ‘testimonial evidence,’ *Crawford* has overruled the holding of *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), permitting introduction of an unavailable witness’s statement – despite the defendant’s inability to confront the declarant – if the statement bears adequate indicia of reliability, i.e., it falls within a ‘firmly rooted hearsay exception’ or it bears ‘particularized guarantees of trustworthiness.’ *Roberts*, *supra* at 66. However, we conclude that the child’s statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. . . .

“[A]t least with respect to nontestimonial evidence such as the child’s statement in this case, . . . the reliability factors of *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), are an appropriate means of determining admissibility. . . . We therefore conclude that defendant has failed to establish plain, outcome-

determinative error with respect to his Confrontation Clause claim.”

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

On page 364, after the April 2004 update, insert the following text:

The Michigan Court of Appeals in *People v Geno*, ___ Mich App ___, ___ (2004), held that a child-victim's statement to an interviewer at a children's assessment center does not constitute testimonial evidence under *Crawford v Washington*, 541 US ___ (2004), and therefore is not barred by the Confrontation Clause.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.2 Post-Conviction Bail

A. Before Sentencing

On page 442, insert the following text as a new subsection 2 and renumber the remaining subsection appropriately:

2. Convictions For Sexual Assault of a Minor

Effective June 30, 2004,* if a defendant is convicted of sexual assault of a minor and is awaiting sentence, the court must detain the defendant and deny him or her bail. MCL 770.9b(1). A minor refers to an individual who is less than 16 years of age. MCL 770.9b(3)(a). “Sexual assault of a minor” means a violation of any of the following involving an individual who is less than 16 years of age:

- ♦ First-degree criminal sexual conduct, MCL 750.520b. MCL 770.9b(3)(b)(i).
- ♦ Second-degree criminal sexual conduct, MCL 750.520c. MCL 770.9b(3)(b)(i).
- ♦ Third-degree criminal sexual conduct involving force or coercion used to accomplish penetration, MCL 750.520d(1)(b). MCL 770.9b(3)(b)(i).
- ♦ Third-degree criminal sexual conduct involving penetration of a victim who is mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520d(1)(c). MCL 770.9b(3)(b)(i).
- ♦ Third-degree criminal sexual conduct involving penetration of a victim who is related to the defendant by blood or affinity to the third degree, MCL 750.520d(1)(d). MCL 770.9b(3)(b)(i).
- ♦ Third-degree criminal sexual conduct involving a victim who is between the ages of 16 and 18 and a student at a public or nonpublic school and the defendant is a teacher, substitute teacher, or administrator of that public or nonpublic school, MCL 750.520d(1)(e). MCL 770.9b(3)(b)(i).

Note: MCL 770.9b(3)(b)(i) contradicts itself. In order for the defendant to be convicted of MCL 750.520d(1)(e), the victim must be at least 16 years of age but less than 18 years of age. However, pursuant to MCL 770.9b, “sexual assault of a minor” requires that the victim be less than 16 years of age.

*See 2004 PA 32.

- ♦ Third-degree criminal sexual conduct involving penetration of a victim who is at least 13 years old but under the age of 16, MCL 750.520d(1)(a), if the defendant is five or more years older than the victim. MCL 770.9b(3)(b)(ii).
- ♦ Assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 770.9b(3)(b)(iii).

B. After Sentencing and Pending Appeal

On page 443, insert the following text as a new subsection 2 and renumber the current subsection 2:

2. Convictions For “Sexual Assault of a Minor”

If a defendant has been convicted and sentenced for committing a sexual assault against a minor and files an appeal or application to appeal, the court must detain the defendant and deny bail. MCL 770.9b(2). See Section 9.2(A)(2), above, for the definition of “sexual assault of a minor.”

CHAPTER 9

Post-Conviction and Sentencing Matters

9.3 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

Effective May 13, 2004, 2004 PA 98 amended MCL 333.5129 governing testing for venereal disease, hepatitis, and HIV.

A. Mandatory Testing and Counseling

On page 446, replace the first paragraph with the following text:

Under MCL 333.5129(4), a defendant who is convicted of, or a juvenile who is found responsible for, violating any of the following offenses must be ordered by the court with jurisdiction over the criminal prosecution or juvenile hearing to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS:*

*SCAO Form
MC 234.

9.3 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

D. Positive Test Results Require Referral for Appropriate Medical Care

On page 448, replace the first sentence in this section with the following text:

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a venereal disease, hepatitis B, hepatitis C, or HIV must be referred by the agency providing the counseling or testing for appropriate medical care. MCL 333.5129(8).

E. Ordering Payment of the Costs of Examination and Testing

On page 448 after subsection (D) insert the following new subsection:

Upon conviction or juvenile adjudication, the court may order an individual who is examined or tested under MCL 333.5129 to “pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test.” MCL 333.5129(10). MCL 333.5129(11) states:

“An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] shall be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments shall be allocated as provided under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32, the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69, and the crime victim’s rights act, 1985 PA 87, MCL 780.751 to 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$100.00, or both.”

CHAPTER 9

Post-Conviction and Sentencing Matters

9.5 Imposition of Sentence

E. Probation

5. Contents of Probation Orders

Effective May 26, 2004, 2004 PA 116 amended MCL 771.3 to allow the court to impose an additional condition on probationers. Near the middle of page 461, add the following bullet to the end of the bulleted list:

- ♦ Complete his or her high school education or obtain the equivalency of a high school education in the form of a general education development (GED) certificate. MCL 771.3(2)(q).

Update: Sexual Assault Benchbook

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the second full paragraph on page 364, which cites *People v Meredith*:

The admission of prior testimonial statements violates a defendant's constitutional right to confrontation unless the prior statements were subject to cross-examination by the defendant and the person who made the statements is unavailable to testify. For confrontation clause purposes, the reliability of prior testimonial statements must not be determined by reference to rules of evidence governing admissibility of hearsay evidence, or by whether the statements bear "particularized guarantees of trustworthiness." *Crawford v Washington*, ___ US ___, ___ (2004). In *Crawford*, the United States Supreme Court overruled *Ohio v Roberts*, 448 US 56 (1980), which held that admission of an unavailable witness's prior statements did not violate the Sixth Amendment if the statements bear "adequate indicia of reliability." The Court declined to provide a comprehensive definition of "testimonial statement"; however, the Court stated:

"Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at ___.

CHAPTER 11

Sex Offender Identification and Profiling Systems

11.2 Sex Offenders Registration Act

L. Pertinent Case Law Challenging Registration Act

4. Double Jeopardy, Equal Protection, and Due Process Under U.S. Constitution

Replace the last paragraph on page 529 and the text on page 530 with the following text:

In *Fullmer v Michigan Dep't of State Police*, ___ F3d ___, ___ (CA 6, 2004), the Court held that the public registry provisions of Michigan's Sex Offenders Registration Act do not violate the procedural due process standards for sex offender registries that were set forth in *Connecticut Dep't of Public Safety v Doe*, 538 US 1 (2003).*

*See the April 2003 update for a detailed discussion of *Connecticut Dep't of Public Safety v Doe*.

Update: Sexual Assault Benchbook

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.6 Concurrent Criminal and Civil Proceedings

B. The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions

Insert the following "Note" at the top of page 505, after the December 2002 update:

Note: MRE 410 prohibits the admission of nolo contendere pleas except "in a civil proceeding to support a defense against a claim asserted by the person who entered the plea." MRE 609 permits the impeachment of a witness' credibility with proof of a conviction of a crime involving dishonesty or a false statement. The Court of Appeals in *Shuler v Michigan Physicians Mutual Liability Company*, ___ Mich App ___, ___ (2004), held that MRE 410 and MRE 609 do not conflict with each other. The Court stated:

"MRE 410 excludes evidence of a *plea* of no contest, while MRE 609 permits use of certain *convictions* for impeachment purposes, regardless whether the specific conviction followed a guilty plea, a no-contest plea, or a not-guilty plea." *Id.* at ___ (emphasis in original).

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

E. Pertinent Case Law

4. Definition of Terms

Insert the following case summary at the bottom of page 137:

“Distributes” is not defined in MCL 750.145c. In *People v Tombs*, ___ Mich App ___, ___ (2003), the Court of Appeals stated that the word “distributes” “comprises several definitions that each describe different conduct” and is therefore ambiguous. In order to provide meaning to the word “distributes,” the Court turned to the legislative purpose behind the statute. The Court concluded that a narrow construction of “distributes” properly avoids criminalizing transferring material to authorities or disposing of material. Therefore, “distributing” requires the “intent to disseminate child sexually abusive materials to others.” *Id.* at ___.

In *Tombs*, the defendant was convicted of distributing child sexually abusive material. As a part of the defendant’s employment, he was given a laptop computer to use. When the defendant quit his job, the employer retrieved the laptop and found child sexually abusive material on the computer’s hard drive. A jury found the defendant guilty of distributing child sexually abusive material for “distributing” the material through the laptop computer to his employer. On appeal, the defendant claimed that he did not intend to distribute child sexually abusive material. The defendant indicated that he believed the company was going to erase the hard drive without viewing its contents. The Court of Appeals reversed the defendant’s conviction, holding that in order to prove that a defendant “distributed” the material, the prosecutor must prove that the defendant intended to disseminate the material. *Id.*

CHAPTER 3

Other Related Offenses

3.11 Dissemination of Sexually Explicit Matter to Minors

Effective January 1, 2004, 2003 PA 192 amended MCL 722.671 et seq., regarding the dissemination of sexually explicit matter to minors. Beginning on page 144, replace the text in Section 3.11, subsections (A), (B), (C), and (D) with the following text:

A. Statutory Authority—Disseminating and Exhibiting

A person is guilty of disseminating or exhibiting sexually explicit matter to a minor* under MCL 722.675(1) if that person does either of the following:

“(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

“(b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.”

1. Mens Rea

“Knowingly disseminates” means that the person “knows both the nature of the matter and the status of the minor to whom the matter is disseminated.” MCL 722.675(2).

A person knows the nature of the matter if the person is either “aware of its character and content” or “recklessly disregards circumstances suggesting its character and content.” MCL 722.675(3).

A person knows the status of a minor if the person is “aware” that the minor is under 18 years of age or “recklessly disregards a substantial risk” that the minor is under 18. MCL 722.675(4).

2. Statutory Exceptions

MCL 722.675 does not apply to the persons, entities, and occupations under MCL 722.676(a)-(f), which are listed as follows:

“(a) A parent or guardian who disseminates sexually explicit matter to his or her child or ward.

“(b) A teacher or administrator at a public or private elementary or secondary school that complies with the revised school code [MCL 380.1-380.1852], and who disseminates sexually explicit matter to a student as part of a school program permitted by law.

*For purposes of this offense, a “minor” is a person under age 18. MCL 722.671(d).

“(c) A licensed physician or licensed psychologist who disseminates sexually explicit matter in the treatment of a patient.

“(d) A librarian employed by a library of a public or private elementary or secondary school that complies with the revised school code, [MCL 380.1-380.1852], or employed by a public library, who disseminates sexually explicit matter in the course of that person’s employment.

“(e) Any public or private college or university or any other person who disseminates sexually explicit matter for a legitimate medical, scientific, governmental, or judicial purpose.

“(f) A person who disseminates sexually explicit matter that is a public document, publication, record, or other material issued by a state, local, or federal official, department, board, commission, agency, or other governmental entity, or an accurate republication of such a public document, publication, record, or other material.”

B. Statutory Authority—Displaying

A person is guilty of displaying sexually explicit matter to a minor* under MCL 722.677(1)(a)-(b) if that person:

- ♦ Possesses managerial responsibility for a business enterprise selling sexually explicit visual material that depicts sexual intercourse or sadomasochistic abuse and is harmful to minors; and
- ♦ Does either of the following:
 - knowingly permits a minor not accompanied by a parent or guardian to view that matter; or
 - displays that matter knowing its nature, unless the person does so in a restricted area.*

1. Mens Rea

“Knowingly permits” means that the person “knows both the nature of the matter and the status of the minor permitted to examine the matter.” MCL 722.677(2).

A person knows the nature of the matter if the person is either “aware of its character and content” or “recklessly disregards circumstances suggesting its character and content.” MCL 722.677(3).

A person knows the status of a minor if the person is “aware” that the minor is under 18 years of age or “recklessly disregards a substantial risk” that the minor is under 18. MCL 722.677(4).

*For purposes of this offense, a “minor” is a person under age 18. MCL 722.671(d).

*See Section 3.11(C) for the definition of “restricted area.”

C. Relevant Statutory Terms

“Display” means “to put or set out to view or to make visible.” MCL 722.671(a).

“Disseminate” means “to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to do the same.” MCL 722.671(b).

“Exhibit” means to do one or more of the following:

“(i) Present a performance.

“(ii) Sell, give, or offer to agree to sell or give a ticket to a performance.

“(iii) Admit a minor to premises where a performance is being presented or is about to be presented.” MCL 722.671(c).

“Restricted area” means any of the following:

“(i) An area where sexually explicit matter is displayed only in a manner that prevents public view of the lower 2/3 of the matter’s cover or exterior.

“(ii) A building, or a distinct and enclosed area or room within a building, if access by minors is prohibited, notice of the prohibition is prominently displayed, and access is monitored to prevent minors from entering.

“(iii) An area with at least 75% of its perimeter surrounded by walls or solid, nontransparent dividers that are sufficiently high to prevent a minor in a nonrestricted area from viewing sexually explicit matter within the perimeter if the point of access provides prominent notice that access to minors is prohibited.” MCL 722.671(e).

“Harmful to minors” means sexually explicit matter that meets all of the following criteria:

“(i) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.

“(ii) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.

“(iii) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors.” MCL 722.674(a).

For definitions of “sexually explicit matter,” “sexually explicit performance,” “sexually explicit verbal material,” and “sexually explicit visual material,” see MCL 722.673.

D. Penalties

A violation of disseminating or exhibiting sexually explicit matter to a minor under MCL 722.675(1) is a felony punishable by imprisonment for not more than 2 years or maximum \$10,000.00 fine, or both. MCL 722.675(5). When imposing the fine, the court shall consider the scope of defendant’s commercial activity in disseminating sexually explicit matter to minors. *Id.*

A violation of displaying sexually explicit matter under MCL 722.677(1) is a misdemeanor punishable by imprisonment for not more than 93 days or a maximum \$5,000.00 fine, or both. MCL 722.677(5).

CHAPTER 8

Scientific Evidence

8.2 Expert Testimony in Sexual Assault Cases

A. General Requirements for Admissibility of Expert Testimony

Effective January 1, 2004, the Michigan Supreme Court amended MRE 702. On the bottom of page 400 and the top of page 401, replace the first paragraph of subsection (A) and the note with the following text:

MRE 702 provides the standard for admissibility of expert testimony:

“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

The staff comment to amended MRE 702 states as follows:

“The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words ‘the court determines that’ after the word ‘If’ at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court’s gatekeeping role in excluding unproven expert theories and methodologies from jury consideration.”

Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert, supra*, 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert*.

Replace the last bullet on the bottom of page 402 and the first paragraph and note on page 403 with the following text:

Effective January 1, 2004, MRE 702 no longer contains its former requirement that expert testimony be based on knowledge “recognized” by the appropriate scientific community. After January 1, 2004, MRE 702, as amended, succeeds Michigan’s *Davis/Frye* rule as primary authority governing the admissibility of expert scientific testimony. The amended rule’s omission of the word “recognized” impacts the efficacy of those previous Michigan court decisions that addressed the admissibility of expert testimony based on whether the information was classified as a product of those scientific or technical disciplines “recognized” as credible sources at the time of the decision. To the extent they do not conflict with MRE 702 and the guidelines contained in *Daubert* and *Kumho Tire*, cases decided under the *Davis/Frye* rule *may* provide guidance to trial courts to review the reliability of proffered expert testimony.